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WILL DRINKING DIE AS GAMBLING DID?

Racetrack Betting Was Abolished by Law in New York Thirteen Years Ago; the Racing Game Itself, Never More Popular or Prosperous Than Now, "Died" in 1908. Will the Mullan-Gage Prohibition Act Go the Way of the Hart-Agnew Anti-Gambling Law, the Curious Are Asking

By ARTHUR H. LABAREE
Illustration by Ellison Hoover

THERE is still hope left for those whose habits, or preferences, find no sympathy with the prohibition law. Does this hope anticipate the revocation of the Volstead and the Mullan-Gage regulations? Never!

But just think a moment.

When the Hart-Agnew anti-racetrack gambling bills were passed in 1908 wasn't the death knell of racing being sounded? To heed the reformers of that day, it certainly was. And wasn't the bookmaker to be as extinct as the Dodo as soon as Charles E. Hughes, then Governor, signed the bills? Absolutely. Has anything of the sort occurred? Has the sport of kings ceased to flourish and have the "bookies" been forced to go to work for a living? You know they haven't.

The newspapers, during the New York legislative session of 1908, were just as full of anti-gambling legislation as they have ever been of the approach of prohibition. It was proclaimed by the reformers, and many racing enthusiasts sadly agreed, that if the Hart-Agnew bills were passed the racetracks would be cut up and sold as building lots, the bookmakers would be condemned to hard labor and the breeding of horses would go blooey. Racetrack habitués had hysterics and the blue law advocates rejoiced.

The Hart-Agnew bills passed the Assembly on June 10, 1908, by a vote of 98 to 28 and were immediately rushed to the Senate, where the real fight was being waged. There the vote was split almost evenly.

To be accurate, there were two anti-gambling bills, the first known as the Hart-Agnew measure and the second as the Percy-Gray law. They were companion measures, and, for the sake of convenience, have since been referred to by the name of the first of the pair of bills. McKinney's edition of the Penal Law, which is considered a standard, does not mention the latter measure in tracing the history of legislation prohibitory of gambling.

In June, 1908, every newspaper in New York State was full of the fight being waged at Albany over the Hart-Agnew and Percy-Gray bills. On June 11 and 12 they devoted columns to an account of how the bills had passed the Senate by a margin of one vote, the poll being 26 to 25, after having passed the Assembly. Most of them made a hero of Senator Otto G. Foelker, of Brooklyn, who left a sickbed to journey to Albany and cast his legislative ballot in favor of the measures sponsored by Governor Hughes. After the final passage of the measures, which amended Section 351 of the Penal Law, Governor Hughes was quoted as saying:

"It is a victory for law and order the importance of which cannot be overestimated."

And Thomas Hitchcock, then considered the largest owner of steeplechase racers in the country, was quoted as making this doleful plaint: "This is the worst blow ever struck at legitimate racing."

"It was conceded that eventually racing would stop if betting were stopped," one New York City newspaper stated, in announcing the passage of the bills.

Lest it be thought that this newspaper was "hedging" in its last phrase, it was the consensus of opinion throughout the state that racetrack betting was a thing of the past the moment Governor Hughes dipped his pen into the gubernatorial inkwell and affixed his name to the bills, which he lost no time in doing.

That law is still upon the statute books. It repealed Section 351 of the Code and became Section 986 of Chapter 88. This is how it reads:

"Any person who engages in pool selling or bookmaking, with or without writing, at any time or place, or any person who keeps or occupies any room, shed, tenement, tent, booth or building, float or vessel, or any part thereof, or who occupies any place or stand of any kind upon any public or private grounds within this state, with books, papers, apparatus or paraphernalia for the purpose of recording or registering bets or wagers or of selling pools, and any person who records or registers bets or wagers or sells pools or makes books, with or without writing, upon the result of any trial or contest of skill, speed or power of endurance of man or beast, or upon the result of any political nomination, appointment or election, or upon the result of any lot, chance, casualty, unknown or contingent event whatsoever; or any person who receives, registers, records or forwards, or purports or pretends to receive, register, record or forward, in any manner whatsoever, any money, thing or consideration of value, bet or wagered, or offered for the purpose of being bet or wagered, by or for any other person, or sells pools upon any such result; or any person who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth or dwelling, float or vessel, or part thereof, or of any grounds within this state, knowingly permits the same to be used or occupied for any of these purposes, or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers, or the selling of such pools, or becomes the custodian or depositary for gain, hire or reward of any money, property or thing of value, staked, wagered or pledged, or to be wagered or pledged upon any such result; or any person who aids, assists or abets in any manner in any of the said acts which are hereby forbidden is guilty of a misdemeanor, and upon conviction is punishable by imprisonment in a penitentiary or county jail for a period of not more than one year."

Isn't that definitely explicit? Would the laymen consider that there was any way out of or around the provisions of that law? Read it again. Notice that its provisions apply to any person doing any of the things forbidden—not just professional bookmakers, but anybody at all. It even makes it a misdemeanor to register a bet upon an election, or to be a stakeholder in such a connection, provided the stakeholder does it for gain, hire or reward.

Apparently, that anti-gambling law was as copper-riveted as the bluest reformer might wish, and evidently the racetrack interests thought so from the doleful statements, damp with sobs, that were printed about that time.

But, first thing the reformers knew, it was decided that when the law said "any person" it didn't mean that at all. Judge Haight is quoted with a wealth of authority and references, in McKinney's annotations to the Penal Law, as deciding, in People ex rel. Lichtenstein versus Langan, 196 N. Y., 260, 264, that "the evidence must show that the accused belongs to the class of common gamblers. Bookmaking is distinct from the mere making or recording of bets. In others words, this section is aimed only at those who make a practice of betting with all comers, so that for one engaging in a game of golf to bet with his opponent is not within the section, though a memorandum of the bet may be made."

That is not the whole of the worthy jurist's decision, which occupies a closely printed page, but it is the gist of it, and it demonstrates that the law didn't mean what it said. How easy it would be to change a few words in Justice Haight's decision to make it apply to the present-day drought.

"The evidence must show," the decision might read, "that the accused belongs to the class of common drinkers. 'Bootlegging' is distinct from the mere making of home brew. In other words, this section is aimed only at those who make a practice of drinking with all comers, so that for one engaging in a game of golf to drink with his opponent is not within the section, though a memory of the drink might linger."

Section 986 of the Penal Code was and is as actively enforced as the Mullan-Gage law, but that has not put an end either to racing or bookmaking. The purpose of this comparison is to show that the Mullan-Gage law will not put an end either to drinking or bootlegging. And if the Mullan-Gage law does not, the Volstead act certainly won't, because the Federal authorities have never been as active in attempting to enforce the latter as the state and city authorities are in abiding by the provisions of the former. They cannot be, for the Volstead law is nation-wide, and it would take an army of men to attempt its full enforcement. In the City of New York there are more than 10,000 policemen, all of whom are charged with the duty of enforcing the state prohibition law, and many of whom are assigned to nothing else. At that rate, the number of Federal agents who would be required to enforce the Volstead law would be impossibly great. The national statute, therefore, need not be given much consideration. Every reader knows how futile was the attempt to enforce it until the state passed the Mullan-Gage legislation.

What is the result of the attempted enforcement of the Hart-Agnew law? Practically nil. Racing, now at its height in New York State, was never so successful. Never have such throngs attended each day's events. And never was betting more freely done, according to those who know the game.

Bookmakers flourish at every racetrack in the state. It is known that bets are accepted both inside and outside the racetracks, that handbooks are made on every street and in almost every semi-public building, such as tobacco shops, barber shops and hotels, within a radius of, say, five miles from the tracks, and that in New York City a large number of the employees of every business house talk of racing and betting most of the day and pore over "dope sheets" and "past performance records" well into the night.

But that condition is not the fault of the police. Alleged bookmakers are arrested every day. And ninety-nine out of every hundred are discharged by a magistrate the next day. Why? Because the law, iron-bound as it seems to one reading it, has been shot full of holes by judicial decisions.

In Jamaica, L. I., which is the racing center of New York State, being the focal point of three tracks, there is a young man who may be referred to as Sam Browne, for that is nothing like his real name. He is mentioned particularly because he will serve as an example of how the police do their duty, and how betting goes on just the same.

Everybody in Jamaica knows that Sam is a bookmaker. Nobody makes any secret of it. A man with a "hot tip" or a "hunch" on a horse may learn this in almost any building in that community. Let him drop into a cigar store, for instance, and ask the clerk where he can put down a little bet.

"See Sam Browne; he'll take it," says the clerk, anxious to oblige.

So the visitor gets an introduction to Sam. That is easy, provided he can prove that he isn't a detective, imported from Manhattan for the occasion—Sam knows all the local sleuths. Sam takes his bet, and, if the bettor wins, he will be certain of getting his money, as Sam is an honest gambler.

So much for the secrecy of Sam's operations. He is a professional bookmaker, so, no matter how the Hart-Agnew law has been mussed up by decisions, one would still think that Sam would soon be convicted under its provisions. But he isn't, although he is arrested about once every week. Sometimes, if the detectives are busy, they let him alone for as much as two weeks. Then Sam says:

"Good morning, Judge. I'm in again."

To the credit of the Jamaica jurists, it should be noted that never, so far as is known, has one of them replied: "So I see. What's good in the first race at Belmont Park to-day?

The detectives testify that they observed Sam accepting little slips of paper from various persons; that when he was searched these slips were found to bear the names of horses entered to race that day; that he was equipped with racing charts, an entry list and other racing information. But, the detectives have to admit they saw no money passed. Of course they didn't. That was done elsewhere and at another time, or through another person. Then Sam's lawyer demands how they know the names on Sam's scraps of paper were the names of horses. They read 'em in a paper.

"Move to strike it out," snaps the attorney. "That's hearsay evidence."

Suppose, though, that the detectives visited one of the local tracks and actually saw horses bearing the same names run in a race. How, questions the counselor, do they know that the names on the paper slips referred to the same horses or, for that matter, to any horses at all? Might not the written names have been those of pet dogs, for instance? The detectives don't know that. No one could. So this testimony is stricken out. As for the racing charts and the entry lists, aren't they published in every newspaper in the country? The sleuths are compelled to acknowledge it.

"Do you, therefore, arrest every man you see reading the sporting page of a newspaper?" cross-examines the lawyer.

Of course, they don't.

"Then, your honor, I move to dismiss, on the ground that the prosecution has failed to make out a case," announces the legal luminary.

"Motion granted," rules the judge—there is nothing else for him to do—and Sam goes back to his bookmaking.

Suppose, though, that Sam has made the mistake of not recognizing a detective and has accepted a bet from him, even to personally taking the money. That's nothing to worry about. The law says, or the decisions upon it do, that one bet doesn't make a bookmaker, any more than one swallow makes a summer. How can the detectives prove that because Sam took a bet from one of them he takes bets from all comers and makes his living that way. They can't, so Sam is acquitted anyhow.

This year a new method has been attempted to obtain convictions of makers of handbooks. They were not charged with accepting bets upon the races, but merely with disorderly conduct. The detectives complained that they caused crowds to collect and used loud and boisterous language, "all tending to a breach of the peace."

There being no other evidence introduced, the defendants usually made no defense, but paid the fines of $5 each imposed upon them and went their way, with the day's profits scarcely disturbed. Or, if they objected to being convicted of disorderly conduct they brought half a dozen friends to court who swore that there was no crowd or that, although they happened to be near, they heard no loud conversation and there wasn't any breach of the peace. This created a reasonable doubt, and out went the case, with "discharged" marked on the papers.

As for the bettors, they are never disturbed, so everybody interested in racing is happy and the sport continues unmolested. This being so, despite the apparently inescapable provisions of the law quoted heretofore, how about the man who likes his liquor? What hope is there that the Mullan-Gage law may go the way of the Hart-Agnew measure and become practically a dead letter, enforced, so far as arrests are concerned, but of little effect in the way of convictions?

Race horses have not died out, so, presumably, the supply of liquor will not either. So much for that. As to the enforcement of the law, it has already become somewhat relaxed in New York City as compared with its rigid enforcement during last April and May. This is because of the decision of the Corporation Counsel that a man's pockets, handbag, automobile and home are inviolate, except when a search warrant has been issued. To procure a search warrant there must be some evidence presented tending to a reasonable belief upon the part of the judge issuing the warrant that there has been a violation of the law. Otherwise, if every judge issued search warrants at the mere request of a detective it would be only a question of time when every house in the state would be entered and searched by zealous sleuths. The decision of Corporation Counsel O'Brien has given the highball devotee a cause to smile for the first time in many arid weeks. He is now fairly safe in laying in a renewed stock from his family bootlegger and when he goes on a trip he may even take a bottle in his handbag or automobile, so long as it is concealed from public gaze. For Mr. O'Brien has officially decided that no peace officer has the legal right to search an automobile or demand the opening of a handbag.

Before that decision not a cocktail was safe. At the slightest suspicious indication, or at none, the New York City policeman not only could, but did, stop and search your automobile or, if your grip looked heavy, demand that it be opened for inspection forthwith. A refusal to comply precipitated an argument that led to the police station and the entering of a charge of disorderly conduct anyway, and then, with the prisoner in a cell awaiting a bondsman, the search was made. If liquor was found, an additional charge was promptly entered.

The detectives assigned to prohibition violations did not enter private houses by force. They visited suspected homes with the utmost freedom, however, usually calling at an hour when they were reasonably certain that the male head of the family would be out. A determined aspect and a flashing of badges were invariably sufficient to cow the women and children into giving the desired permission to make a search, and then, if liquor were discovered, no warrant was necessary. Restaurants and saloons were visited almost hourly and a search made of the ground floors. Being public resorts, it is understood that no warrant is required, even now, to go through them, but the saloonkeeper or restaurateur who keeps and sells thirst-quenchers more potent than those containing only one-half of 1 per cent knows that this is so, and can take precautions accordingly.

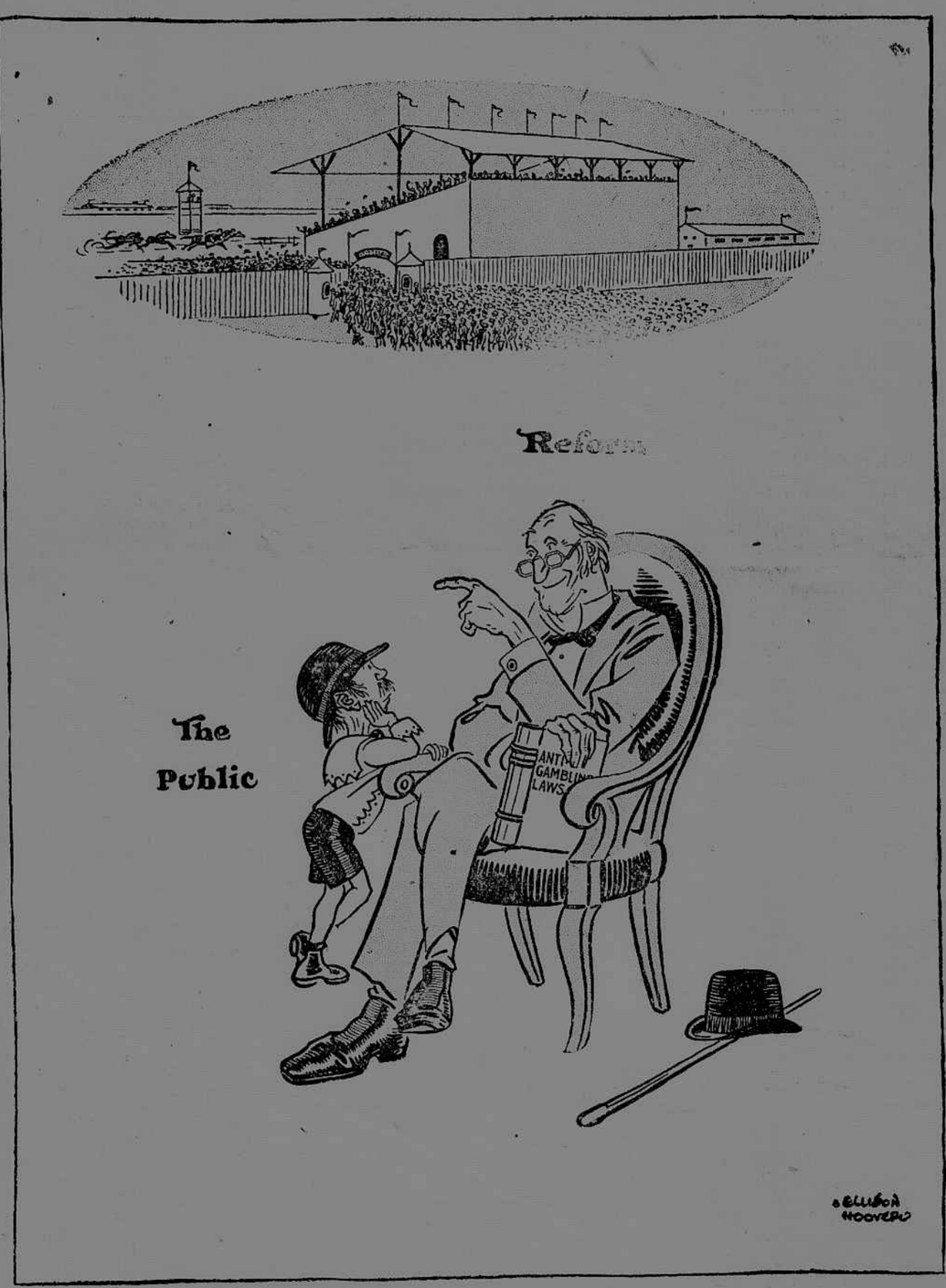
It is evident, therefore, that already there has been one decision of value to the thirsty, so it may be only a question of a comparatively short time when the Mullan-Gage law has been judiciously interpreted to permit as wide a latitude as has the Hart-Agnew law prohibiting gambling.

But the hootch-lover should not be too jubilant. It will prove harder to circumvent the Mullan-Gage law than it was Section 986. The reason is that, in the case of the suspected bookmaker, the burden of proof rests entirely upon the prosecution. The arresting officers must prove, beyond a reasonable doubt, that the defendant makes a living by accepting wagers and that he did accept a wager in the specific instance cited.

But Chapter 155 of the Laws of 1921—in other words, the Mullan-Gage measure—contains a paragraph that reverses the situation. Instead of the prosecution having to prove that the defendant is guilty, the defendant is compelled to prove that he is innocent. Presumption of innocence until guilt is proved, a legal adage supposed to extend back almost as far as the law of the Medes and Persians, doesn't "go" in this case. For the Mullan-Gage law contains this nifty little trick provision, known as Section 1216:

"The possession of liquors by any person not legally permitted under this article to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this article, and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used."

Even that provision, however, does not seem to the layman any more definite or unbreakable than those of the Hart-Agnew law, already cited, so the anti-prohibitionists may take heart. There is, after all, a faint hope left that an oasis may open in the desert of drought and the principal indoor sport of the convivially inclined may not be gone forever.



"But what good came of it at last?" asked little Peterkin. "Ah, that I do not know," quoth he, "but 'twas a famous victory!"